No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 2020

VICTOR MONDRAGON,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE DISTRICT COURT ERR BY DENYING MR. MONDRAGON A THREE-LEVEL DOWNWARD ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY ?

II. DID THE PANEL ERR BY EMPLOYING THE "WITHOUT FOUNDATION" STANDARD OF REVIEW IN DETERMINING THAT THE DISTRICT COURT DID NOT ERR BY DENYING MR. MONDRAGON AN ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REPORTS OF OPINIONS

The decision of the Court of Appeals for the Fifth Circuit is reported as *United States v. Victor Mondragon*, No. 20-10210 (5th Cir. November 6, 2020)(not published). It is attached to this Petition in the Appendix.

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment of conviction and sentence in the Northern District of Texas.

Consequently, Mr. Mondragon files the instant Application for a Writ of Certiorari under the authority of 28 U.S.C., § 1254(1).

BASIS OF FEDERAL JURISDICTION

IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Northern District of Texas because Mr. Mondragon was indicted for violations of Federal law by the United States Grand Jury for the Northern District of Texas.

STATEMENT OF THE CASE

1. Procedural History.

On April 24, 2001, Victor Mondragon and two codefendants were named in two-count Indictment filed in the Northern District of Texas, Dallas Division. Count 1 charged each defendant with Conspiracy to Distribute and Possession With Intent to Distribute Marijuana, more than 100 kilograms, in violation of 21 U.S.C. §§ 846, 841(a)(1) & (b)(1)(B). Count 2 charged each defendant with Possession With Intent to Distribute Marijuana and Aiding and Abetting, more than 100 kilograms, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(B) and 18 U.S.C. § 2. On July 2, 2001, Mondragon appeared before the Honorable Paul D. Stickney, U.S. Magistrate Judge, on behalf of the Honorable Joe Kendall, U.S. District Judge, for Arraignment, wherein he pleaded guilty to Counts 1 and 2 of the Indictment. On the same day, Magistrate Judge Stickney issued a Report and Recommendation Concerning Plea of Guilty to the District Court and recommended Mondragon's plea of guilty be accepted and he be adjudged guilty and sentenced accordingly. There is no Plea Agreement in this case.. ROA. 25-26.[1]

[1]In the references to the Record on Appeal, references are made according to the pagination assigned by the Clerk of the Court.

On September 17, 2001, Mr. Mondragon appeared before Judge Kendall for sentencing and Judge Kendall issued an oral order, which continued sentencing until October 29, 2001. On October 29, 2001, Mr. Mondragon failed to appear for sentencing and a bench warrant was issued.

On June 16, 2019, Mr. Mondragon was arrested by an officer with the Altus, Oklahoma, Police Department for Driving Under the Influence of Alcohol and No Valid Driver License. Mr. Mondragon was arrested under the alias name Miguel Castanado and was released from custody before authorities learned his identity. On September 17, 2019, Mr. Mondragon was arrested without incident by deputies with the U.S. Marshals Service at 2728 West Davis Street in Dallas, Texas.

On September 18, 2019, Senior Judge Fitzwater issued an order accepting Mr. Mondragon's plea of guilty and adjudged him Guilty.

Mr. Mondragon was subsequently sentenced to a term of imprisonment of 97 months. ROA.79-80. The District Court imposed a four-year term of supervised release. ROA.80. No fine was imposed, but Mr. Mondragon was ordered to pay a $200 special assessment. Thereafter, Mr. Mondragon timely filed a Notice of Appeal.

On November 6, 2020, a panel of the Court of Appeals for the Fifth Circuit affirmed the Petitioner's conviction in an unpublished decision.

2. Statement of Facts.

Mr. Mondragon is a 59-year old man who was born in Mexico. Growing up, he was raised by his parents with his siblings in Mexico. His family was poor and he began to work on a ranch when he was five years old. Although they were poor, his family was not abusive and all his material needs were met. Mr. Mondragon was sexually assaulted by an unspecified person when he was approximately eight years old. He stated he did not report this assault to his parents and revealed the perpetrator resided in a surrounding community. Mr. Mondragon never told anyone about this assault before his interview with the PSR officer. Mr. Mondragon told the PSR officer that the assault, coupled with information he received from an individual who was incarcerated, scared him to the extent that he absconded while on pretrial release.

Mr. Mondragon's father died in 1997 due to heart problems and his mother passed away in or around 2005 due to complication stemming from a broken leg. His sister, Juana Mondragon Perez, died in 1984 due to typhoid fever and his brother, Antonio Mondragon Perez, passed away in 2015 from diabetes. Mr. Mondragon communicates frequently with his sisters Tomasa Mondragon Perez in Mexico and Celsa Mondragon Perez who is a factory worker in Dallas. He has other siblings throughout the United States and Mexico with whom he is in less frequent

communication. Mr. Mondragon is the father of seven children. He maintains a close relationship with his children.

In the Factual Résumé, Mr. Mondragon and the government stipulated that beginning April 1, 2001, and continuing through on or about April 3, 2001, Mr. Mondragon agreed with other persons, primarily co-defendant Gonzalez, to acquire, or cause to be acquired marijuana (a Schedule I controlled substance) in Mexico; to transport, or cause to be transported, said marijuana to the Norther District of Texas; and to distribute or cause to be distributed said marijuana to persons in the Northern District of Texas. Specifically, Mr. Mondragon acknowledged on or about April 3, 2001, co-defendant Gonzalez arranged for co-defendant Gutierrez to transport approximately 1,100 pounds of marijuana from Laredo to Dallas in a semi-tractor trailer for distribution to Mr. Mondragon. Mr. Mondragon further stipulated on or about April 3, 2001, he engaged in a telephone conversation with co-defendant Gonzalez during which they made arrangements for the distribution of approximately 1,100 pounds of marijuana. Mr. Mondragon and the codefendants were held to be responsible for 438.5 kilograms of marijuana. That is the conduct that comprised the charge to which he entered a plea of guilty. ROA.227.

The Presentence Report (PSR) assigned Mr. Mondragon a base offense level of 26 for the grouped counts, pursuant to U.S.S.G. §2D1.1(a)(5).[2]

The PSR officer determined that, by failing to appear at his original sentencing hearing, Mr. Mondragon obstructed justice; therefore, the offense level was increased by 2 levels pursuant to U.S.S.G. §3C1.1. The PSR officer did not assign an adjustment for acceptance of responsibility. Based upon a total offense level of 28 and a criminal history category of I, the guideline range for imprisonment was 78 to 97 months. Mr. Mondragon objected to the lack of an adjustment for acceptance of responsibility. The District Court denied this objection on the record during the hearing. ROA.72.

Before the District Court imposed the sentence on Mr. Mondragon, the following colloquy occurred:

MR. MENCHU: Your Honor, I'll just preface this, Mr. Mondragon is very nervous, so he wrote out what he would like to say to you.

THE DEFENDANT: (Through interpreter): May she read it? Your Honor, I request in the very best way that you would consider -- have consideration of me and my family. I still have two young daughters that very much need me. I can prove that I have always worked well. What I am accused of was just a mistake and today I'm very sorry for it, for having

[2]"PSR" refers to the Presentence Investigation Report filed by the United States Probation Department (under seal).

accompanied these people. I -- I am so sorry. And I'm just asking for you to give me a chance. Thank you.

THE COURT: Thank you, sir.

MR. MENCHU: Thank you, Your Honor.

THE DEFENDANT (Through interpreter): And my daughter is also here.

MR. MENCHU: All right. Thank you, Your Honor. So you've seen my sentencing memo, and -- and I know you know what the guideline range is, 78 to 97 months. We've heard what the government is asking for. The government is citing the change in the guidelines that maybe have benefited (sic) Mr. Mondragon. That's true. That's all true. But we also have the big picture, the big picture in life. This is almost 20 years later, two decades. A person can change. And luckily Mr. Mondragon's involvement was not with heroin or methamphetamine, the bad ones. I know the methamphetamine guidelines are the highest, but heroin and others like that are the most severe to me. He was not involved in anything like that. I know you're probably sick of hearing this, but marijuana will be completely legal soon. At least it was just marijuana, it wasn't one of the poisons that say Mr. Meitl will refer to. And he stopped it and he came back and he worked and he worked and he supported his family, he did what we wanted him to do. This is a man who I would say was self-rehabilitated. He has been no danger to our society for the last 20 years. And incarcerating him for extra time at the cost of $37,448 per year I don't think benefits our society. The sentence I've asked for is more than sufficient to satisfy the sentencing needs. And, judge, I think it's important, and I hesitate to say things like this out loud, we have full courtrooms, but it's -- I guess it's important to help him, and I know you took this into consideration when you were determining whether he received acceptance and had a -- a factor that warranted -- that -- that I had sufficient evidence to get his acceptance. He did come to court for sentencing with Mr. Sasso in 2001. He appeared in court for sentencing. He didn't run. The sentencing for some reason, I don't

know, I spoke with Mr. Sasso, I know him, and he doesn't remember exactly what happened, but sentencing was continued that day.

THE COURT: On the defendant's motion.

MR. MENCHU: Yes. Yes. On Mr. Sasso's oral motion. That is correct, Your Honor. That was Mr. Sasso's motion. There was a second date set. And in between that time -- and I found Mr. Mondragon to be very credible, it's in the presentence report, he came upon a gentleman who had been in prison and had been the victim of sex assault, of extremely traumatic sex assault. Well, Mr. Mondragon had been there too as a child, one of the worst crimes there is, sex assault against a child, AND that affected him so -- so much that he didn't show up. So it wasn't that he just didn't want to show up. He was here for sentencing and then that factor occurred. And he's human. He's human. So does that mean he should be in jail now for nine years or so? When in the big picture for the last almost 20 years he's been a productive member of our community? I don't think so. And -- and not for the underlying case we have here either. I've been in front of you many times. I know that you generally stick with the guidelines. The guidelines are advisory.

THE COURT: They were mandatory at the time he was supposed to appear before the court, isn't that correct?

MR. MENCHU: That's correct. But they are not now. They're not now.

THE COURT: But had he obeyed and been present, I just think it's important to note, they would have been mandatory.

MR. MENCHU: Okay. Correct, judge. I can't change the facts. They're not mandatory now for a reason. Because -- in my opinion because they -- they're out of line. Here is a man that has done nothing wrong -- that has been a productive member of society for the last 20 years and if five years isn't sufficient sentence on a marijuana

case from 20 years ago then I don't know what is and I ask you to sentence him to 60 months.

THE COURT: I think the point would be he doesn't get to make those decisions for the court by his own conduct. That's the point.

MR. MENCHU: Okay. I understand that. I understand. And we're all parents. I understand as parents sometimes our kids make mistakes and we may want to punish them one way but really the just way is this. So, yeah, he does get the advantage of two point reduction. It's not mandatory anymore. I understand that. And we don't -- you may not like that, but it doesn't mean that 60 months isn't a fair sentence.

THE COURT: And did he live under his actual name all this time?

MR. MENCHU: He used another name, Your Honor.

THE COURT: And when he was arrested on -- on the vehicle charge he was under a false name at that time, was he not?

MR. MENCHU: That is correct, judge.

THE COURT: Okay. Mr. Menchu, do you have anything else to present at this time?

MR. MENCHU: Your Honor, we just wanted to add that one of his daughters showed up a little later after we started and she had written a letter for you. She brought today. It's rather lengthy. I think you know what it says. It says he's been a wonderful father and she hopes he's out as soon as possible. Thank you, judge.

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THE COURT: Counsel, do you have any reason why sentence cannot lawful be imposed at this time?

MR. MENCHU: No reason.

MR. MEACHAM: No, sir.

THE COURT: Mr. Mondragon, are you ready for me to pass sentence upon you?

THE DEFENDANT: (Through interpreter): Yes.

THE COURT: The record will reflect that there is no plea agreement in this case. The court is required by statute to impose a sentence that is sufficient but not greater than necessary to comply with the purposes for sentencing set forth in Title 18, United States Code, Section 3553(a)(2) and is to consider all of the factors of Section 3553(a), which the court has done. Having considered the statutory factors and the purposes for sentencing, I've determined that a sentence of 97 months is sufficient but not greater than necessary to comply with the purposes for sentencing set forth by statute. Accordingly, on counts 1 and 2 of the indictment it is adjudged that the defendant is hereby committed to the custody of the Bureau of Prisons for a term of 97 months for each of counts 1 and 2.

The District Court sentenced Mr. Mondragon to a 97-month term of imprisonment. ROA. 79-80. The District Court also sentenced Mr. Mondragon to serve a four-year term of supervised release. ROA.80. Mr. Mondragon objected to the District Court's sentence as being unreasonable. This objection was denied. After the sentencing hearing, Mr. Mondragon timely filed a notice of appeal.

Mr. Mondragon appealed. His conviction and sentence was affirmed by a Panel of the Fifth Circuit on November 6, 2020.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The sentence imposed by the District Court was legally unreasonable because it did not include a downward adjustment for acceptance of responsibility. The District Court's decision to deny the adjustment was based on erroneous reasoning and rose to the level of "legally unreasonable". The Panel, using an incorrect standard of review, found that the District Court did not err by denying Mr. Mondragon an adjustment for acceptance of responsibility because the decision of the District Court was not "without foundation". *See United States v. Mondragon*, No. 20-10210 (5th Cir. Nov. 6. 2020)(not published).

Sentencing Guideline §3E1.1 provides for a reduction in offense level if the defendant demonstrates an affirmative acceptance of personal responsibility for his criminal conduct. A timely plea of guilty and a truthful admission of criminal conduct is significant evidence of acceptance of responsibility. Other conduct can outweigh this evidence, but only if it is "inconsistent" with such acceptance of responsibility. U.S.S.G. §3E1.1, cmt. (n.3).

Mr. Mondragon timely pleaded guilty, admitted both the conduct comprising the conviction and all relevant conduct, and expressed remorse for his offense. The district court nevertheless denied an acceptance adjustment, based on Mr. Mondragon's failure to appear at his sentencing hearing in 2001. The district court's

decision to deny the adjustment was harmful error. Had the district court rightfully granted Mr. Mondragon's two acceptance points, his guideline range would have been 63-78 months. Mr. Mondragon's sentence must therefore be vacated and remanded for resentencing.

Under sentencing guideline §3E1.1, a defendant is entitled to a 2-level reduction if he "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. §3E1.1(a). "Entry of a plea of guilty prior to the commencement of trial," when "combined with truthfully admitting the conduct comprising the offense of conviction," constitutes "significant evidence of acceptance of responsibility." *Id*., cmt. (n. 3). This evidence, however, "may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." *Id*.

The following colloquy regarding the adjustment for acceptance of responsibility occurred during the sentencing hearing:

THE COURT: Mr. Menchu, am I correct that the sole objection that you are making is addressed to the revised presentence report submitted with the second addendum and that the objection is solely the one relating to acceptance of responsibility?

MR. MENCHU: That is correct, Your Honor.

THE COURT: Do you wish at this time to present any argument or evidence in support of that objection?

MR. MENCHU: Your Honor, I have no further evidence other than what is referred to in my written objection and will stand by that objection. I think it stands for itself. This is almost 20 years later. The two factors he has met. He's truthfully admitted the offense. That doesn't mean he has to admit anything he may have done wrong in his life, but he truthfully admitted this offense during his first probation interview back in 2001 and in his second probation interview in 2019. The one thing I'm not sure about, judge -- and I will tell you when I don't know something. I won't hide my ignorance. We have these two factors. I think he's met factor A and that he's been truthful in his involvement. But I don't know the weight we give each factor, if they are 50/50 or something else. But factor B, voluntary termination or withdrawal from criminal conduct, my position is I can prove that and he has met that factor beyond what -- a hundred percent, because we know for the last -- since 2001 he has been here working and providing for his family. Now, he did reenter illegally, I understand that, I can't get by that. But he has been a productive member of the community working hard. He's got a great job, he had a great job, and supporting his family. So he has voluntarily terminated from criminal conduct or association, and he has truthfully admitted the offense. Judge, I don't know what else he can do. I believe he has accepted responsibility.

THE COURT: All right. The court in ruling on the objection is basing its factual findings upon a preponderance of the evidence that has a sufficient indicia of reliability to support its probable accuracy. The court's legal conclusions are based upon its interpretation of the guidelines, the application notes, and the controlling law. The presentence report and the addenda to the presentence report are considered to be reliable bases upon which to make factual findings absent some basis to question their reliability or the presentation by the defendant of rebuttal evidence or a showing otherwise. In this case the court overrules the objection to paragraph 42 wherein the defendant contends he should be given a reduction for acceptance of responsibility. Application note 4 of the commentary provides that conduct resulting in an

> enhancement under guideline 3C1.1, which is obstruction of justice, ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. The application note provides that there may be extraordinary cases in which adjustments under both of these guidelines apply. I find, however, that this is not an extraordinary case in which the defendant receives an enhancement for obstruction is one in which he also has accepted responsibility. I note that application note 5 provides that the sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. Based upon my position and my consideration of the materials before me, I find that this is not an extraordinary case in which the defendant has accepted responsibility and has also obstructed justice. ROA. 70-72.

The District Court erred by finding that Mr. Mondragon's case does not present an extraordinary case. Although obstruction of justice typically indicates a lack of accepting responsibility, in extraordinary cases it is possible for a defendant to have obstructed justice and accepted responsibility for his actions. *United States v. Chung,* 261 F.3d 536 (5th Cir. 2001), USSG § 3E1.1 cmt. 4 (2016). The Application Note states that there may be extraordinary cases in which adjustments under both USSG §§ 3C1.1 and 3E1.1 may apply.

Mr. Mondragon appeared in Judge Kendall's court for sentencing on September 17, 2001. Sentencing did not take place on that date but was rescheduled for October 29, 2001. Mr. Mondragon failed to appear for his rescheduled sentencing hearing on October 29, 2001. A bench warrant was issued on that date. Mr. Mondragon's appearance at his first sentencing date is evidence of his desire to

comply with his court obligations. The reason he subsequently did not appear was that he met an individual after the September date who had just been released from prison. This individual scared Mr. Mondragon with stories of being victimized sexually by fellow prisoners. Mr. Mondragon had already been a victim of sexual assault. Sex assault is extremely traumatic to its victims, including Mr. Mondragon. For fear of being victimized again, Mr. Mondragon did not appear in court the second time.

Approximately 18 years later, on June 16, 2019, Mr. Mondragon was arrested in Altus, Oklahoma, for a misdemeanor offense, and was released. Three months later, he was arrested by U.S. Marshals Service deputies in Dallas, Texas, without incident. The day following his arrest, he was brought before a U.S. Magistrate Judge, waived his right to a detention hearing and the case was reset for sentencing. This case is extraordinary in that, after Mr. Mondragon failed to appear for his sentencing hearing, he ultimately resumed his life in Dallas, Texas, living and working with his family. Mr. Mondragon remained in Dallas for over a decade and lived at the same address for the past nine years.

Pursuant to USSG §3E1.1, comment. (n.1), the first two determining factors to consider when deciding whether a defendant qualifies for acceptance of responsibility are:

(A) Truthfully admitting the conduct comprising the offense of conviction and truthfully admitting or not falsely denying any additional relevant conduct.

Mr. Mondragon was interviewed by U.S. Probation Officers on July 12, 2001, and November 13, 2019. During the first interview, Mr. Mondragon admitted he assisted with the unloading of marijuana. During the second interview he further admitted the facts he stipulated to in the Factual Résumé were true and admitted his guilt in the offense.

(B) Voluntary termination or withdrawal from criminal conduct or association.

Mr. Mondragon led a law-abiding life from the date he failed to appear for sentencing until his arrest on June 16, 2019. At the time of Mr. Mondragon's sentencing, no charges have been filed related to this arrest.

Mr. Mondragon did not appear for his sentencing hearing and that yielded a 2-level sentencing increase for Obstruction of Justice under USSG §3C1.1. After he failed to appear, however, he did not continue to lead a life of crime and did not continue to overtly obstruct justice. He ultimately returned to Dallas, Texas, knowing he had an active warrant and continued to live his life. He worked and supported his family. He did not continue a life of crime. His is an extraordinary case in which the

Court can apply both an enhancement for Obstruction of Justice under USSG §3C1.1 and a reduction for Acceptance of Responsibility under USSG §3E1.1.

Here, Mr. Mondragon did not deny any facts, file any motions, frivolously contest any relevant conduct, or put the government to any type of proof. The district court's finding that Mr. Mondragon obstructed justice was appropriate but it does not create a foundation for the denial of a reduction for acceptance of responsibility. Mr. Mondragon's conduct cannot be viewed as "inconsistent" with his overall acceptance of responsibility for his criminal conduct. His failure to appear at the second sentencing hearing cannot be said to outweigh his guilty plea and truthful admission to that charge, as required by Application Note 3. *Cf. United States v. Diaz-Corado*, No. 10-40179, 2009 WL 8239170, at *2 (5th Cir. Aug. 2, 2011) (unpublished)(relevant commentary in the *Guidelines Manual* is generally authoritative). Accordingly, the district court misapplied §3E1.1 when it denied Mr. Mondragon a reduction for acceptance of responsibility.

Incorrect Standard of Review

In affirming the District Court's decision, the Panel determined that "the district court's conclusion that extraordinary circumstances did not justify the award of a reduction acceptance of responsibility is not without foundation". The standard of review "without foundation" is a standard of review more deferential than the

clearly erroneous standard. *See United States v. Juarez-Duarte*, 513 F.3d 204, 211 (5th Cir. 2008) (per curiam).

This standard of review is incorrect. The facts in this case are uncontested. Mr. Mondragon suggests, as another Circuit stated, "if the only issue presented is the propriety of applying the reduction to the uncontested facts, the decision is reviewed *de novo*." *United States v. Denson* , 728 F.3d 603, 614 (6th Cir. 2013).

Harm Analysis

In this case, the court's erroneous reliance on Mr.Mondragon's failure to appear conduct was not harmless. While Mr. Mondragon "bears the initial burden of showing that the district court relied upon an invalid factor at sentencing," he "does not have the additional burden of proving that the invalid factor was determinative in the sentencing decision." *United States v. Jones*, 444 F.3d 430, 436 (5th Cir. 2006); *see* also *Williams v. United States*, 503 U.S. 193, 203 (1992). "Rather, once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed." *Id*. The burden for showing harmlessness falls on "the party defending the sentence on appeal." *United States v. Corley*, 978 F.2d 185, 186 (5th Cir. 1992); *see* also *Williams*, 503 U.S. at 203.

First, the government must compellingly prove that the district court would have imposed a sentence outside the properly calculated sentencing range for the same reasons it provided at the sentencing hearing. *United States v. Ibarra–Luna*, 628 F.3d 712, 718–19 (5th Cir. 2010). Second, the government must demonstrate that the "sentence the district court imposed was not influenced in any way by the erroneous Guidelines calculation."*Id*. at 719. "This is a heavy burden." *Id*. at 717.

The sentence assessed-- 97 months-- is not available when utilizing the proper total offense level of 26; which, when cross-indexed with Mr. Mondragon's criminal history category of I, yields an advisory guideline range of only 63-78 months. *See* U.S.S.G. Ch. 5, Pt. A. Any increase in sentence constitutes harm to Mr. Mondragon. *See United States v. Glover*, 531 U.S. 198 (2001).

The District Court made no statements during the sentencing hearing from which one could even speculate that the district court would have imposed a sentence outside the advisory guideline range. Because the District Court's procedural error was not harmless, this Court is respectfully requested to vacate the sentence assessed below and remand for new hearing on punishment.

The District Court erred by denying an offense reduction for Mr. Mondragon's acceptance of responsibility. Because the denial of the reduction lead to a larger offense level than otherwise would have been used in calculating the guideline range

applicable to Mr. Mondragon, and because he was sentenced at the top end of the range found by the District Court, he was sentenced outside the proper guideline range and his sentence is unreasonable.

Because the Panel employed an incorrect standard of review, Mr. Mondragon therefore requests that this Petition be granted, that the decision by the Panel is vacated, and that the case is remanded to the Fifth Circuit for proceedings consistent with this Court's decision; or that his sentence be vacated and remanded to the District Court for re-sentencing.

CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Fifth Circuit should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

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RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 25th day of November, 2020, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

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VICTOR MONDRAGON,

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APPENDIX

OPINION OF THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 6, 2020
Lyle W. Cayce
Clerk

No. 20-10210
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

VICTOR MONDRAGON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:01-CR-136-3

Before HAYNES, WILLETT, and HO, *Circuit Judges*.

PER CURIAM:*

Victor Mondragon appeals his concurrent, within-guidelines sentences of 97 months of imprisonment imposed following his guilty plea convictions of one count of aiding and abetting and possession with intent to distribute marijuana and one count of conspiracy to distribute and possession

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

with intent to distribute marijuana. His total offense level included an upward adjustment for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, because he failed to appear for sentencing in 2001. He argues that the district court erred by declining to grant him a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1, contending that his case is of the extraordinary kind where both the §§ 3C1.1 and 3E1.1 adjustment may apply.

This court will "affirm the denial of a reduction for acceptance of responsibility unless it is without foundation, a standard of review more deferential than the clearly erroneous standard." *United States v. Lord*, 915 F.3d 1009, 1017, *cert. denied*, 140 S.Ct. 320 (2019) (internal quotation marks and citation omitted). Conduct resulting in an enhancement for obstruction of justice, pursuant to § 3C1.1, "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct." § 3E1.1, comment. (n.4). Yet, there may be extraordinary cases in which both adjustments apply. § 3E1.1, comment. (n.4); *United States v. Chung*, 261 F.3d 536, 540 (5th Cir. 2001).

Mondragon initially minimized his involvement in the offense of conviction and failed to appear for sentencing in 2001, remaining at large for 18 years. His acceptance of responsibility following his rearrest does not overcome the obstruction enhancement for absconding. *See United States v. Ayala*, 47 F.3d 688, 691 (5th Cir. 1995). Although he asserts his failure to appear was based on good reasons and not on lack of acceptance, given the facts surrounding his abscondence, the district court's conclusion that extraordinary circumstances did not justify the award of a reduction acceptance of responsibility is not without foundation.

The judgment of the district court is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
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CLERK

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600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 06, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 20-10210 USA v. Victor Mondragon
USDC No. 3:01-CR-136-3

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5TH Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5TH Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By:_____
Christina C. Rachal, Deputy Clerk

Enclosure(s)

Ms. Amy R. Blalock
Mr. Brian W. McKay
Ms. Leigha Amy Simonton